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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1947

No. 511 145

TITLE INSURANCE AND GUARANTY COMPANY, ELIZABETH HUMPHREY, HARRY LEE JONES, JULIAN M. EDWARDS and MARJORIE B. EDWARDS,
Petitioners (Appellants below),

vs.

JAMES P. HART, Trustee of Mount Gaines Mining Company, Debtor,
Respondent (Appellee below).

PETITIONERS' REPLY BRIEF.

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Petitioners (Appellants below),

vs.

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Respondent (Appellee below).

PETITIONERS' REPLY BRIEF.

I.

See Response, p. 12.

DECISION IN INSTANT CASE IS IN CONFLICT WITH THE DECISION IN WIEMEYER v. KOCH.

Respondent states (p. 12):

The decision in the case of *Wiemeyer v. Koch* by the Eighth Circuit is not in conflict with the holding in the instant case that: "the assumption, rejection

and automatic rejection provisions of Sec. 70b are inconsistent with and inapplicable to Chapter X reorganization proceedings".

Respondent's argument:

"The legal question decided by the above quoted statement of the Circuit Court in the instant case was the conflict and inconsistency between the provisions of Chapter X and the provisions of Sec. 70b as applied to the assumption or rejection of leases. That legal question was not touched upon in the *Wiemeyer* case. Therefore there is not that conflict in decisions on a question of law which requires the conflict to be settled by this Court." (Res. pp. 12-13.)

In the *Wiemeyer* case, the Circuit Court of Appeals for the Eighth Circuit determined that the first two sentences of Sec. 70b referred to in the above quotation from the decision in the instant case *did* apply to Chapter X reorganization proceedings. This determination necessarily involved a determination by that Court in that case that the said two sentences of Sec. 70b were not in conflict with or inconsistent with sections 116(1) and 216(4) or any other provision of Chapter X.

II.

See Response, p. 13.

DECISION IN WIEMEYER CASE NOT DICTUM.

Respondent states (p. 13):

"A summary of the facts in the *Wiemeyer* case will disclose that the statement of law relied upon by petitioners as conflicting with the decision in the instant case was not necessary to the decision and is only dictum."

This claim by respondent is denied by petitioners.

In the *Wiemeyer* case the decision states (p. 233):

> "A hearing was held on various claims including that of appellants, and on October 2, 1944, the court entered an order disallowing appellants' claim, the action of the court being based on the fact that no order of this court was ever made authorizing the temporary trustee to affirm or adopt the lease * * * and the same was not so affirmed or adopted, hence the claimants are not entitled to the allowance of any sum by way of rent as such."
>
> * * * * * * *
>
> "In seeking reversal of this order denying their claim appellants contend: (1) No formal election under an order of court was necessary to make the lease binding between appellants and the debtor; (2) the trustee elected to keep the lease in effect by his position taken during the proceedings; (3) the evidence is not sufficient to sustain the allowance of $1800 per year; the lease furnishing the measure of the allowance to be made." (*Wiemeyer v. Koch*, 152 F. 2d 230 at 233.)

From the foregoing it appears that the issue of law on the appeal in *Wiemeyer v. Koch* was whether or not the trustee had assumed the lease, and that the Circuit Court of Appeals for the Eighth Circuit in that case held that the trustee had not assumed the lease and would be deemed to have rejected the lease because he neither assumed nor rejected it within the time limited in the first two sentences of Section 70-b (pp. 233-234.)

III.

See Response, p. 13.

THE DECISION IN THE INSTANT CASE TO THE EFFECT THAT THE FIRST TWO SENTENCES OF SECTION 70b ARE INCONSISTENT AND INAPPLICABLE TO CHAPTER X INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

(1) Respondent asserts on page 13 that the conflict between Section 70b and Chapter X referred to in the decision in the instant case (R. 1418) is obvious and therefore no important federal question is involved. Respondent ignores the fact that the Circuit Court of Appeals for the Eighth Circuit in its decision in *Wiemeyer v. Koch* (8 Cir.), 152 F. (2d) 230, did not discover any such conflict for it held in that case that the first two sentences of Section 70b *did apply* to Chapter X reorganizations. (See Petition p. 17.)

(2) Respondent on pages 17 and 18 of his response states:

"All decisions of Federal Courts, in which the conflict and inconsistency between the provisions under discussion of Section 70b and the provisions governing rejection of executory contracts in reorganization proceedings under Chapter X, is in question uniformly hold that the rejection provisions of Section 70b have no application to reorganization proceedings". This statement by respondent does not square with the facts.

The only one of the three cases cited by respondent in support of his said claim which holds that Section 70b is inconsistent with Sections 116(1), 202, and 216(4) of Chapter X is *In re Childs* (D.C.S.D.N.Y., 1945), 64 F. Supp. 282.

The decision in *In re Childs* is based primarily on the assumption that a trustee in a Section 77B or a Chapter X reorganization has no authority to assume or *reject* a lease without an order of Court. The decision holds:

> "Under Sec. 77B and particularly Sec. 77B (c) (5), the rule was laid down that a trustee in a reorganization proceeding under Sec. 77B had no such authority to adopt or reject a lease without authorization from the court; that power to reject or assume a lease was not lodged in the debtor or in the trustee but devolved exclusively upon the judge. In re Cheney Bros., D.C.12, F.Supp. 605; Gerdes on Corporate Reorganizations, page 1137, Section 694. Compare In re Walker, 2 Cir., 93 F. 2d 281, 283."

The rule announced in *In re Cheney Bros.* and *In re Walker* cited in *In re Childs* to the effect that a

trustee has no authority to assume a lease without order of Court, seems to have been overruled or at lease modified by this Court in 1941 in the case of *Philadelphia Company v. Dipple,* 312 U. S. 168-176, 85 L. Ed. 651 at 655. Strangely enough this Supreme Court case was not referred to in *In re Childs.*

Philadelphia Company v. Dipple holds:

> "Notwithstanding the fact that Sec. 77B gives no specific authority to trustees in reorganization to reject burdensome leases or contracts, it is well settled that they have that right and are accorded a reasonable time within which to exercise it."

And this Court in 1943 in *Institutional Investors v. Chicago M. St. P. & R.,* 318 U. S. 523-578 at 549, 87 L. Ed. 859 at 999, refused to hold that *only* burdensome leases may be rejected by the trustee or Court in Section 77B reorganizations. The Court held:

> "We do not need to determine however what is the scope of the authority to reject leases under Sec. 77B either by the trustee or pursuant to a plan of reorganization."

(3) Since the decision in *In re Childs* was rendered, two Federal Court decisions having a bearing on the question as to whether or not the first two sentences of Section 70b apply to Chapter X reorganizations have been handed down. In *Finn v. Meighan,* 325 U. S. 300, 89 L. Ed. 1624, decided May 21, 1945, this Court in a Chapter X reorganization proceeding states: "Congress granted the trustee

sixty days (unless reduced or extended) in which to assume or reject a lease. Section 70b of the Bankruptcy Act as amended * * *." We make bold to presume that this Court in that decision thereby intended to suggest that a second and more impelling legal reason for denying the trustee's claim that he had the right to assume the lease therein involved should have been urged on that appeal, viz.: That the trustee, *by failing to assume or reject the lease wtihin sixty days after the adjudication,* would be deemed to have rejected the lease under the said provisions of Section 70b. This presumption is strengthened by the fact that when this Court amended its decision in the *Finn* case on June 11, 1945, after it had taken into consideration Sections 116(1), 202 and 216(4) of Chapter X, it still retained in its decision the said statement to the effect that: "Congress granted to the trustee sixty days (unless reduced or extended) in which to assume or reject a lease. Section 70b of the Bankruptcy Act * * *."

The second recent Federal Court decision which is in conflict with *In re Childs* is *Wiemeyer v. Koch* (8 Cir.), 152 F. (2d) 230, decided December 26, 1945. The decision in this case does not refer to *In re Childs.* (See Petition p. 17.)

IV.

See Response, p. 21.

THERE IS CONFLICT BETWEEN THE DECISION IN THE INSTANT CASE AND THE DECISION IN IN RE WALKER AS TO WHETHER A TRUSTEE CAN ASSUME A LEASE WITHOUT ORDER OF COURT.

(1) Respondent on page 21 states:

"Question of assumption not an issue in *Walker case.*"

Petitioners maintain that there is such an issue, unless *In re Walker* was overruled by implication by this Court in *Philadelphia Company v. Dipple, supra.*

In *In re Walker* (2 Cir.), 93 F. (2d) 281, which was a Section 77B reorganization proceeding, the lessors petitioned the District Court to lift the injunction against their evicting the debtor retained in possession as trustee or to direct the debtor to surrender possession of the leased premises. They alleged that the debtor had: "* * * forfeited the term because (1) the reorganization proceedings was one in bankruptcy; (2) because the term had devolved by operation of law upon the debtor in a new capacity; * * *"

> "Lessors' petition was referred to the referee as special master and he reported that the lessors had lost any power to forfeit the term which they might have had by accepting the payments of rent made to them by the debtor. Upon review, the District Judge reversed the special master holding that the payments made were not to be considered as rent, and that they did not

toll the reentry. The debtor appealed. On the appeal, the Circuit Court of Appeals for the Second District held:

"Such a debtor does not pay as lessee; it may not do so, it is forbidden to affirm the lease without order of court, and the payment of rent as rent would be as much an affirmance, if lawful, as is the lessor's 'acceptance'. Its position as debtor, 'continued in possession', is for all practical purposes that of a trustee or receiver as we have said * * * for rent could not possibly become due until affirmance."

V.

See Response, p. 22.

NOT TRUE THAT DISTRICT COURT IN INSTANT CASE ORDERED AFFIRMANCE OF LEASE.

On page 22 respondent states:

"However, even if the quoted statement from the *Walker* case correctly states the law, it is not in conflict with the instant decision. In the instant case, there were orders of the District Court directing the affirmance of the lease." Petitioners assert this statement is not supported by the facts.

The first pretended "affirmance" order was contained in the order of "adjudication" made June 29, 1939. (R. 17-18.) This order, instead of directing the debtor to assume the lease, as is claimed by respondent, directed the debtor to take over the leased mine

and to operate *in total disregard of the lessors' rights under the lease,* viz.:

"The lessee shall pay as a royalty to the owner ten per cent (10%) of all production of and from said mine." (R. 39.)

The District Court in its said order directed that the lessors should be paid royalties from the smelter returns *after all "administrative and operation expenses" including "taxes" and "adequate working capital" and "capital expenditures"* had been deducted and paid. (R. 18.)

Furthermore, on the same day that the District Court made its said order, it made this further order:

"That the debtor shall be allowed until September 10, 1929, unless the time be extended further by order of this Court, within which to report to this Court as to the advisability of rejecting any contract of the debtor, executory in whole or in part; and continued operation of the debtor, under any of said contracts within said period allowed for such reports, and until the order directing such rejection, shall not be deemed to conclude this Court or the debtor in respect of such election or to constitute an election." (R. 22.)

The second *pretended* "Order of Affirmance" claimed by respondent is the order of the District Court made December 2, 1943, in which order the District Court states:

"It is therefore ordered and adjudged that James P. Hart, the trustee of the above named

debtors * * * immediately file his written application and make demand for the extension of the agreement of lease with option to purchase now owned by the Mount Gaines Mining Company * * * and to take all steps necessary for securing such extension. Said written application and demand to be made upon the Title Insurance and Guaranty Company, a corporation, now the owner and trustee for the owners of the said mining claims." (R. 972.)

Respondent on page 23 of his Response states:

"While the order of December 2, 1943, does not use the word "adopt" or "assume" it would be sacrificing substance to form to say that it did not constitute an order of adoption."

Petitioners submit that there is no basis for respondent's claim that the order of the District Court made December 2, 1943 (R. 972), was intended by that Court to be an order directing the trustee to assume the lease for the reason among others, that the petition of trustee Hart, which was the basis for such order (R. 964-970), did not reveal: "to the Court a proposal to *assume the lease in its entirety,* and it cannot be said from the record that the trial judge knew or even suspected that he was being called upon to approve or adopt the *entire* contract." (*Wiemeyer v. Koch,* 8 Cir., 152 F. (2d) 230-234. See Petition herein, pp. 19-20.) (Italics ours.)

Furthermore it appears from trustee Hart's response herein that he and his attorney believe *now* (as they did in 1943), that in a Chapter X reorgan-

ization proceeding it is not necessary for the trustee to assume or adopt a lease which is an asset of the debtor in order to exercise the powers of the lessee therein, for he states in his Response, pp. 21-22:

"* * * Under Chapter X and the same was true under Section 77B, there was no provision respecting assumption of a lease, certainly no provision requiring an order of the Court. Section 70a vests the title to all property of the debtor, with some exceptions not here pertinent in the trustee. Executory contracts and leases are not among the exceptions."

That trustee Hart did not understand that the said order of October 2, 1943, directed him to assume the lease appears clearly from the record. All that he did pursuant to said order was to serve a written application on the lessor which cannot be tortured into a declaration that he thereby elected to assume the lease *cum onere*. (R. 52-54.)

VI.

See Response, p. 28.

HOW AND WHEN A TRUSTEE IN A CHAPTER X REORGANIZATION PROCEEDING CAN ASSUME A LEASE WHICH IS AN ASSSET OF THE DEBTOR'S ESTATE IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

The Circuit Court of Appeals in the instant case held:

"Appellants argue that Hart as trustee has never assumed the lease. While no writing is found which

expressly so provides, the facts and circumstances clearly demonstrate that he did." (R. 1413.)

See facts and circumstances referred to in the decision. (R. 1413, 1414 and 1415.)

In the *Walker case* the Circuit Court of Appeals for the Second Circuit held that the trustee: "* * * is forbidden to affirm (assume) a lease without order of court" (see Petition, p. 19); and in *In re Childs,* D.C.S.D.N.Y., 64 F. Supp. 282, at 286, cited by respondent, the District Court held:

> "In the final analysis it is the court who has the last say. It is the duty of the court to say whether or not a lease should be rejected or assumed by the trustee."

In the *Wiemeyer case* the Court held:

> "Here there was no formal adoption of the lease either within the sixty days limited by the statute nor at any subsequent time. The court, however, from time to time ordered payment of the rent as provided in the lease and the payments made by the trustee were all at the rate so provided. It is insisted that this was tantamount to an adoption of the lease but the lease was certainly not assumed within sixty days from the adjudication and it was therefore deemed to be rejected. The statutory presumption of rejection by nonaction within the period of sixty days is a conclusive statutory presumption." (*Wiemeyer v. Koch,* 8 Cir., 152 F. (2d) 230-234.)

This Court held in *Philadelphia Company v. Dipple,* 312 U. S. 168-176, 85 L. ed. 651 at 655:

> "Notwithstanding the fact that Sec. 77B gives no specific authority to trustees in reorganization to reject burdensome leases or contracts, it is well settled that they have the right and are accorded a reasonable time within which to exercise it."

And this Court in *Institutional Investors v. Chicago M. St., P. and P.*, 318 U. S. 523-578 at 549, 87 L. ed. 959 at 999, after referring to its decision in *Philadelphia v. Dipple, supra,* and other cases, held:

> "We do not need to determine however what is the scope of the authority to reject leases under Sec. 77 either by the trustee or pursuant to a plan of reorganization."

We submit that considering the number of petitions filed and being filed in the various United States District Courts by corporations for reorganization under Chapter X, the uncertainties in the minds of lawyers and district judges and judges of the Circuit Courts of Appeals as to whether the first two sentences of Section 70b do or do not apply to Chapter X reorganization proceedings, also whether or not a trustee in a Chapter X proceedings may assume or reject a lease without an order of Court authorizing him so to do and the serious financial loss which may result from the failure of a trustee to assume or reject a lease in the manner required by the law which is not yet determined, particularly one which contains one or more options to purchase or for renewals or extensions, we submit that the questions of law referred to under headings "E" and "F" of the Petition herein

are "important questions of federal law which have not been but should be settled by this court".

VII.

See Response, pp. 29-37.

THE DECISION IN THE INSTANT CASE THAT HART AS TRUSTEE "SUFFICIENTLY COMPLIED WITH THE CONDITIONS PRECEDENT" IN THE OPTION FOR A FURTHER LEASE IS IN CONFLICT WITH IMPORTANT LOCAL CALIFORNIA LAW.

Respondent states, page 29:

"Statement by the Circuit Court that there had been sufficient compliance with conditions precedent is not in conflict with California law."

The Circuit Court of Appeals in the instant case held:

"Viewed against this background and against the background of the due diligence exercised by appellee in his faithful performance of the lease, we think he has sufficiently complied with the conditions precedent." (R. 1432.)

The said decision was rendered in the face of the following admitted breaches of the terms and conditions of the lease by the lessee and by Hart as trustee, viz.:

(1) Admission of H. K. Trask, one of the managers of the Mount Gaines Mine for the lessee:

"Royalties for March (1938) were already in arrears when the trustees took over control. For the

month of April production at the mine was barely sufficient to meet running expenses and certain other emergency and absolutely necessary heavy expenditures in the first half of May. The trustees were therefore compelled to let the April royalty go to default. It is now hoped that the earnings are improving sufficiently to make possible the gradual clearing off of these arrears. The owners of the Mount Gaines Mine property have been apprised of present conditions and the trustees have not had from them any word as to their attitude in the matter." (R. 562-563.)

(2) Testimony of J. W. Humphrey, president of Mount Gaines Mining Company:

"A. Some time around the latter part of April, '38.

Q. And it was held after there was a default in the payment of the entire royalty that was due on the 25th day of April, 1938, was it not?

A. That is right.

* * * * * * *

A. I had telegraphed to the other directors * * * that there would not be enough money on hand to pay the workmen's compensation insurance, to pay the power bill, and to pay the payroll. Non-payment of the payroll in California in a mine is a felony; and also not enough money to pay the royalty for the product sold during the month of March, so that we were faced with the proposition of either paying the royalty and taking the chance of committing a felony, or not paying the royalty and not committing the felony * * * that we let the payment of those royalties lapse." (R. 1155-1156.)

(3) W. E. Thain, witness for trustee Hart, testified as to royalties which were *delinquent* in May, 1938:

"A. Net, that is right. According to my computation, the delinquency at that date was $1857.66." (R. 1373.)

(4) It appeared on the trial that the commercial smelter to which the lessee shipped the ore and bullion which it mined from the Mount Gaines Mine made eleven remittances of "net returns" to the lessee during the month of February, 1938, aggregating $26,186.28 (see R. 883, seventh column), and during the month of March, 1938, the smelter made five remittances of net returns to lessee aggregating $9373.11. (See R. 883-884, seventh column.) The total of the remittances for these two months are $35,559.39 from which there would be a royalty due of $3555.94. These royalties were in arrears on May 27, 1938 (R. 562-563) and they have never been paid in full; *and they remained unpaid for the greater part until October 22, 1938.* (R. 953-955.)

(5) The check for $1280.53 for the May, 1938, royalty payable on or before May 25, 1938 (R. 561), was inclosed in a letter bearing date May 27, 1938 (and was deposited in the mail, probably in San Diego or La Jolla, California, sometime after July 1, 1938) as the records of Title Ins. & Guaranty Co. show that this check was received by it on July 6, 1938 (R. 954—*eleven days after the May royalty became delinquent.*

In *Skookum Oil Co. v. Thomas,* 162 Cal. 539 at 546, 123 Pac. 363, the Supreme Court of California held that the fact that the vendee "had not the money and at that particular time it was difficult to borrow money" was "an excuse not deemed of any legal significance in a contact of purchase and sale where time was made of the essence of the contract".

(6) The record shows that lessee and *Hart as trustee* for various periods of time operated the Mount Gaines Mine in violation of the Safety Orders of the California Industrial Accident Commission which have the force of law. (Note twenty-one violations cited in the dissenting opinion of Denman, Circuit Judge. (R. 1440-1444.) These violations constituted breaches of the terms of the lease. (R. 39.))

The Circuit Court of Appeals for the Ninth Circuit in its decision in the instant case holds: "All of these alleged violations appear to be relatively minor infractions." (R. 1427.) Not so to the Supreme Court of the State of California which held in *Ethel D. Co. v. Ind. Accident Comm.,* 219 Cal. 699 at 708 (28 P. 2d 919):

> "More important, the duty of petitioner to comply with the Safety Order of the Accident Commission was one that petitoner owed directly to its employees. It is their safety which is at stake when there is noncompliance with the orders of the Commission, the very object and purpose of which is obviously to insure the maximum safety to individuals engaged in the performance of work which presents mutual hazards and dangers.

The Industrial Accident Commission, in its administrative capacity, possesses no authority to waive or consent to the violation of a duty owing primarily and directly to employee from the employer." (Italics ours.)

In the same case the Court said:

"Serious misconduct" of any employer * * * was defined in *E. Clemens Horst Co. v. Ind. Accident Com.*, 184 Cal. 180, 188, 193 Pac. 105, 108, to be "conduct which the employer either knew, or ought to have known, if he had turned his mind to the matter, to be conduct likely to jeopardize the safety of his employees."

And Circuit Judge Denman's dissenting opinion (R. 1434, 1437, 1439, 1440, 1441, 1442, 1443, 1444, 1445, 1446, 1447 and 1448) is in accord with the decision of the California Supreme Court in the *Ethel D. Co. case* above cited.

VIII.

Response, pp. 29-33.

FAITHFUL COMPLIANCE MEANS STRICT COMPLIANCE.

Respondent contends that "faithful compliance" is not defined by petitioners. (Response, pp. 29-33.)

By the terms of the lease the words "faithful compliance" means "*strict compliance*". The lease provides:

"It is mutually understood and agreed by all the parties hereto, that any failure of the owner to insist

upon strict compliance of the terms of this agreement by the Lessees shall not constitute or be deemed a waiver of the right of the Owner to insist upon such compliance." (R. 41.)

In *Caldwell v. Delaray Mines Inc.,* 68 Cal. App. (2d) 180, 156 P. (2d) 52, the question was whether plaintiffs had complied with the terms of an option to purchase a mine. The action was for specific performance. The Court held in respect to the acceptance of the option:

> "The acceptance must in every respect correspond with the offer, neither falling with nor going beyond the terms proposed, but exactly meeting them at all points, and closing with them just as they are stated. (6 Cal. Jur., p. 61; 17c C.J.S. 378; 12 Am. Jur. 535.)"

See quotation from decision in *Waterman v. Banks,* 144 U. S. 294, 36 L. ed. 479, on page 29 of the Petition:

> "* * * Therefore if there is a day fixed for its performance, the lapse of that day without it being performed prevents him from claiming the benefits."

Note: The *Waterman case* arose in California and involved California local law.

IX.

See Response, p. 32.

TIME IS OF THE ESSENCE OF THE CONDITIONS PRECEDENT IN THE LEASE AND OPTION FOR A FURTHER LEASE.

Respondent states on page 32 of his Response:

"The underpayment of royalties mentioned in the instant case were underpayments at that time, or delays in payments. All royalties were paid before the end of the term, except $93.19 to which the rule of deminimus was applied. The failure to strictly comply with the regulations of the Industrial Accident Commission were temporary. So there had been complete performance at the time that the lessor was called upon to perform."

Respondent continues on page 37 of his Response:

"In the instant case any defaults by delays in the payment of royalties was cured by the subsequent payment thereof. Furthermore, all claimed defaults were waived by the lessor continuing to accept royalties after the defaults occurred."

* * * * * * *

"All failures to comply with regulations of the Industrial Accident Commission were corrected long before the expiration of the term."

The decision of the Circuit Court of Appeals in the instant case wholly disregards the provision of the lease that "time is the essence of this contract" (R. 43) and by so doing its decision herein is a decision of an important question of local California law in

conflict with applicable California decisions and statutes, viz.:

(1) In *Champion G. Min. Co. v. Champion Mines,* 164 Cal. 205, 213, 128 Pac. 315, the Court said:

> "* * * it is well settled that an inexcusable failure on the part of the holder of an option to make a payment when the same should be paid according to the agreement, terminates the rights under the option, and makes it impossible for him to enforce the same, in the absence of a waiver on the part of the other party. (See *Oursler v. Thacher,* 152 Cal. 739, 93 Pac. 1007; *Glock v. Howard,* 123 Cal. 1, 55 Pac. 713.)"

In *Mariposa Com. and Min. Co. v. Peters,* 215 Cal. 134 at 142 (8 P. (2d) 849), the Court said:

> "In the first place they were in default in their rental obligations under the lease, and therefore under the terms of the option they had no power to exercise the option of purchase."

To the same effect is

> *Wightman v. Hall,* 62 Cal. App. 632, 217, P. 580.

California Civil Code, Sec. 1495, provides:

> "An offer of performance is of no effect if the person making it is not able and willing to perform according to the offer."

And in *Crowell v. City of Riverside,* 26 Cal. App. (2d) 566 at 579 (80 P. (2d) 126), the Court said:

> "It is settled that where the breach of a condition consists of subletting, no notice requiring

the performance of the covenant need be served since it is impossible for one guilty of the breach not to do that which he has already done. (*Harloe v. Lambie,* 132 Cal. 133, 135, 64 Pac. 88.) The law does not require a vain act."

See petition herein, pages 26-29 and 32.

See also

Skookum Oil Co. v. Thomas, 162 Cal. 539 at 546-547, 123 Pac. 363. This case cited in support of its decision the case of *Waterman v. Banks,* 144 U. S. 394, 36 L. ed. 479, *quoted on page 29 of the petition herein.*

Schwerin Estates Realty Co. v. Slye, 173 Cal. 170 at 172, 159 Pac. 420.

X.

See Response, p. 38.

THERE IS NO WAIVER OF ANY OF THE CONDITIONS PRECEDENT IN THE OPTION FOR A FURTHER LEASE.

Respondent cites the case of *Kern Sunset Oil Co. v. Good Roads Oil Co.,* 214 Cal. 435-440, 6 P. (2d) 71, to the effect that:

"The acceptance of rent by the landlord from the tenant, after the breach of a condition of the lease with full knowledge of all the facts, is waiver of the breach and precludes the landlord from declaring a forfeiture of the lease by reason of said breach." (Resp. 38.)

The rule of law announced in the *Kern Sunset Oil case* has no application to the case at bar for the following reasons:

(1) Lessors never attempted to exercise their right to declare a forfeiture of lessee's rights as lessee under the lease. Petitioners assert that the *option* for a further lease was revoked and was terminated instanter by operation of law, *ipso facto,* the moment there was a breach of any of the conditions precedent in the option, time being of its essence; and that there could not be any waiver of such revocation and termination of the option. The offer in the option was dead. It could not be revived. It could only be renewed by the lessors. The lessee could have made a counter-offer and such counter-offer could have been accepted by the lessors. There is no proof that there was ever any renewal of the offer by the lessors after it was terminated or any acceptance of a counter-offer by the lessors.

(2) There can be no waiver of a termination of an offer which was revoked by operation of law.

> *Bourdieu v. Baker,* 6 Cal. App. (2d) 150 at 161, 44 P. (2d) 587.

San Bernardino I. Co. v. Merrill, 108 Cal. 490, 494, 41 Pac. 487, in which the Court said:

> "The term 'waiver' or to 'waive' implies an abandonment of a right which may be enforced, or a privilege which can be exercised, and there can be no waiver unless at the time of its exercise the right or privilege waived is in existence. There can be no waiver of a right that has been lost."

Williston on Contracts, Rev. Ed., Vol. 6, Sec. 1270, pp. 5530-5551:

> "No liability can arise on a promise subject to a condition precedent until the condition is performed, and if for lapse of time or for any other reason the condition cannot be performed no liability can ever arise upon the promise. In other words, it will be discharged."

What is commonly called a "waiver" of a breach of a condition precedent in an option is where the offeree makes a counter-offer after the original offer has expired, and the original offerer accepts such counter-offer. (*Williston on Contracts,* Rev. Ed., Vol. 1, Sec. 92, p. 291.)

(3) The covenants and obligations of the lessee in the *lease* were not covenants or obligations of the lessee under the *option* for a further lease. The lessee had no duty or obligation to perform under the *option* for a further lease unless and until he had accepted the offer therein in accordance with its terms. The proof is uncontradicted to the effect that both the lessee and trustee *breached the conditions precedent in the option* and that at the time the trustee requested a renewal of the lease *it was impossible for him to comply with the conditions precedent in the option.* He could not undo the breaches *of the lease* which *were conditions precedent in the option* (*Harloe v. Lambie,* 132 Cal. 133, 135, 64 Pac. 88) time being of the essence.

See

Swift v. Occidental Mining Co., 141 Cal. 161, at 173, 74 Pac. 700 at 704, and Petition, pp. 28-29.

(4) The record shows that James P. Hart was appointed trustee herein on August 11, 1939 (R. 25) and that the most flagrant violations of the Mine Safety Orders of the California Industrial Accident Commission at the Mount Gaines mine occurred under the mine management of the said James P. Hart as trustee during the years 1940, 1941, 1942 and 1943. (R. 653-655; 660-662; 663-668; 669-674 and 682.)

There is nothing in the record to show that the lessors or any of them ever knew or suspected that there were any violations of said orders during 1940, 1941, 1942 or 1943. (See dissenting opinion. (R. 1447.))

Therefore, under no theory recognized by California local law, can it be held that the lessors as offerers under said option for a further lease ever "waived" the breaches of the conditions precedent in the said option resulting from the violation by trustee Hart of the Safety Orders of the California Industrial Accident Commission during 1940-1943 of which they had no knowledge.

In *Taylor v. Budd,* 217 Cal. 262, 18 P. (2d) 333, the Court said:

> "Waiver is an intentional relinquishment of a known right."

XI.

See Response, p. 39.

THE DECISION OF THE CIRCUIT COURT OF APPEALS THAT IN ANY EVENT THE COURT HAD THE POWER TO RELIEVE THE LESSEE AND TRUSTEE FROM A LOSS IN THE NATURE OF A FORFEITURE UNDER CALIFORNIA CIVIL CODE SECTION 3275 IS CONTRARY TO CALIFORNIA LOCAL LAW.

Respondent on page 39 states:

> "The reference to Section 3275 C. C. California not in conflict with local law."

The decision of the Circuit Court of Appeals in the instant case that the Court had the power to relieve Hart as trustee, under the provisions of Calif. Civ. Code, Section 3275, from "a forfeiture or a *loss in the nature of a forfeiture*", by reason of his failure to comply with the conditions precedent in the option for a further lease, is in direct violation of California local law as announced in the following California cases:

Parsons v. Smilie, 97 Cal. 647, at 652-656, 32 Pac. 702;

Crowell v. City of Riverside, 26 Cal. App. (2d) 566, 581, 80 P. (2d) 120;

Shaw v. Guaranty Liquidation Corp., 67 Cal. App. (2d) 660, 155 P. (2d) 53;

Leslie v. Federal Finance Co., 14 Cal. (2d) 73, 80, 92 P. (2d) 906.

In *Parsons v. Smilie* at page 654 the Court, referring to California Civil Code, Section 3275, said:

"Compensation will only be made where there is some measure or standard by which it can be estimated; * * *"

Definition of "wilful".

In *Crowell v. City of Riverside,* 26 Cal. App. (2d) 566, at 581 (80 P. (2d) 120), the Court said:

"Wilful" as the word is used in this code section (Cal. Civ. Code Sec. 3275), is to be understood in its ordinary sense of "spontaneous" or "voluntary". Under this definition all of the admitted breaches of the terms and provisions of the lease by lessee (and by Hart as trustee) were "wilful" and therefore not subject to relief under said code section. (See also Petition, pp. 31-32.)

From the foregoing decisions rendered by the Courts of California as to what constitutes "wilful" as applied to the numerous breaches by the lessee and by the trustee of the terms and covenants in the lease involved in this action, it follows that the decision of the Circuit Court of Appeals for the Ninth Circuit in the instant case to the effect that: "* * * that there was no grossly negligent, wilful * * * breach of duty" (R. 1432-1433) by the lessee or trustee, is a decision of an important question of local California law in conflict with applicable California decisions in that said decision holds that the admitted violations and breaches of the terms and covenants of the lease were not *"wilful"* breaches of duty.

We call this Court's special attention to the dissenting opinion of Denman, Circuit Judge, in which he

clearly points out that the decision of the Circuit Court of Appeals in the instant case is *a decision of an important question of California local law in conflict with Crowell v. The City of Riverside,* 26 Cal. App. (2d) 556, 581, 80 P. (2d) 120, and *Leslie v. Federal Finance Company,* 14 Cal. (2d) 73, 80, 92 P. 2d 906. (R. 1434-1449.)

(See Petition, pp. 29-32.)

XII.

See Response, p. 41.

OPTION IN A LEASE FOR A FURTHER LEASE DOES NOT VEST AN INTEREST OR ESTATE IN THE LEASED PREMISES.

On page 41 respondent states:

> "The Supreme Court of California has definitely decided that an agreement contained in a lease for an extension or renewal *does vest an estate or interest in the property in the lessee.*"

The later decisions of the Supreme Court of California are to the effect that an option in a lease does not create or constitute any title or interest in the leased premises. In *Ware v. Quigley* (1917) 176 Cal. 694 at 698, 169 Pac. 377, the Court said:

> "An option is not a transfer of property. No title is conveyed thereby. It is a mere right of election acquired by one under a contract to accept or reject a present offer within the time therein fixed. (Am. & Eng. Ency. of Law, p. 924.)"

To the same effect see:

Hicks v. Christeson, 174 Cal. (1917) 712-716, 164 Pac. 393;

Johnson v. Clark (1917) 174 Cal. 582 at 584, 163 Pac. 1004;

Daugherty v. California Kettleman etc. (1937) 9 Cal. (2d) 58 at 78, 69 P. 2d 155.

Dated, San Francisco, California,
September 22, 1947.

Respectfully submitted,
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